

STATUS REPORT ON PETITION FOR
STATUTORY ADJUDICATION OF THE KERN RIVER
IN KERN, KINGS AND TULARE COUNTIES
MARCH 1986

On March 22, 1983, the State Water Resources Control Board received a petition from H. P. Anderson III, Kenneth L. Puryear and River West Inc. requesting a statutory adjudication to determine the water rights on the Kern River. The purpose of this report is to inform the Board of the status of the petition and to provide related information regarding use of water and water rights on the Kern River. The petition for statutory adjudication alleges that:

1. There is an unreasonable use of water by upstream pre-1914 appropriators;
2. Various users of Kern River water have not complied with the water right appropriation procedure specified by California Water Code Section 1200, et seq., in the diversion, distribution and use of Kern River water;
3. The pre-1914 appropriators did not put all the water of the Kern River to beneficial use prior to the Water Commission Act;
4. The pre-1914 appropriators have recently initiated new diversions and have increased their diversions beyond their pre-1914 rights, without permits issued by the State Water Resources Control Board.

In accordance with Water Code Section 2525, the Division of Water Rights staff began a preliminary investigation to determine if the public interest and necessity would be served if the Board approves the petition. As explained below, staff has withheld further action in order to allow the petitioner and the Kern River water users an opportunity to pursue alternative routes for resolving the dispute without the need for a statutory adjudication.

History of Development and Use of Water

An understanding of the present water supply and distribution system in the Southern San Joaquin Valley requires a review of the area's water development history. During the 1850's, a rancher named Henry Miller and his partner Charles Lux acquired large tracts of land in the San Joaquin Valley. Miller and Lux claimed a riparian right to the undiminished flow in the Kern River. The claim conflicted with plans of James Haggin and Lloyd Tevis to appropriate water for irrigation of land located some distance from the Kern River. The conflict led to a lawsuit which was appealed to the California Supreme Court and ultimately resulted in the landmark decision of Lux v. Haggin. 69 Cal. 255, 4 Pac. 919 (1884), 10 Pac. 674 (1886). The Supreme Court decision reaffirmed the doctrine of riparian rights and, on remand, resulted in the denial of Haggin's alleged right to use of water by appropriation from the Kern River.¹

¹ The relationship between the rights of riparian water users and appropriators was clarified considerably by the constitutional amendment of 1928 which specified that the use of water and method of diversion of water claimed under any type of right is subject to the requirement of reasonableness.

Following the Lux v Haggin decision, the water users along the Kern River entered into the Miller-Haggin agreement of 1888 which divided the water of the Kern River between upstream and downstream diverters. For the past 100 years, the major users of water from the Kern River have relied upon the original division of water in the Miller-Haggin agreement and have been contracting and interchanging Kern River water among themselves. Diversion and storage projects involving local, state and federal agencies have been constructed apparently in reliance on the pre-1914 appropriative rights. Water disputes, in most cases, have been settled out of court by agreement among the disputing parties.

Below a point on the Kern River known as the First Point of Measurement located northeast of the City of Bakersfield, several canals divert water for use in several water districts. (See maps included as attachment 2). These parties, known as the First Point Diverters, claim to have succeeded to the Haggin share of the Kern River water which allowed them to divert two-thirds of the flow in the river in excess of a right of 300 cubic feet per second which was reserved in the 1888 agreement to the Kern Island Irrigating Canal Company. In accordance with the agreement, the remaining one-third of the water, over 300 cfs, was diverted by Miller and Lux to lands that were company-owned or controlled. These diversions and lands are generally located downstream from the Second Point of Measurement which is located in Section 13, T30S, R25E. Since 1888, many sales and exchange agreements of rights to the use of water from the Kern River have transpired involving numerous parties. Consequently, the present distribution and use of the water is complicated and the basis for the present water rights and alleged water rights is difficult to determine.

Present Unapproved Applications to Appropriate Water from the Kern River

River Ranch, which is owned by Petitioners Anderson, Puryear and River West Inc., (a corporation owned by Anderson and Puryear), is located about six miles north of the community of Lost Hills. The present natural channel of the Kern River passes through the ranch. A portion of the old swamp and overflow area also lies within the ranch and water is diverted under claim of riparian rights for use on that land when it is available. Applications 26472, 26473 and 26474 have been filed with the Board by Puryear, Anderson and River West Inc. to appropriate water from the Kern River for the non-riparian lands. In addition, a number of applications have been filed by other parties to appropriate water from the Kern River for irrigation and proposed power projects. Attachment 1 is a listing of pending applications. Due to the uncertainty regarding the existing water rights on the Kern River, action on the applications has been delayed pending consideration of the petition for adjudication by the Board.

Kern River Intertie

The Kern River Intertie was constructed in 1976 by the U. S. Army Corps of Engineers as a flood control project to divert water from the Kern, Kaweah and Tule River into the California Aqueduct. By letter dated February 26, 1969 the Corps was informed by the Board that, even though the purpose of the project was flood control, excess flood waters were to be exported from the Kern River to areas as far away as Los Angeles for beneficial use. The Board advised the Corps of Engineers that an application to appropriate water was required. The

State Department of Water Resources intended, in 1970, to file an application to appropriate the water to be diverted at the intertie but reconsidered when, in 1980, Department staff advised the directorate of the Department that a permit was not necessary. Instead, the Department decided to rely on four agreements with the local water users which asserted that no unappropriated water was available. The intertie was first used in 1973 when 139,000 acre-feet of water were exported. The largest amount diverted in one year was in 1983 when 750,000 acre-feet were taken.

Lake Isabella

In 1938, Buena Vista Water Storage District et al. filed Applications 9446 and 9447 for year round diversion from the Kern River. The major feature of the project was a storage reservoir to be constructed on the Kern River in the Greenhorn Mountains about 35 miles northeast of Bakersfield. Lake Isabella, with a capacity of 570,000 acre-feet, was finally constructed in 1952 by the U.S. Corps of Engineers as a flood control project. In 1962, First Point, Second Point and the Lower River diverters entered into an agreement which provided for storage of water in Lake Isabella during the winter season to be retained for later release and use. In 1963, the same parties entered into another agreement with Kern County which provided for a minimum recreational pool in Lake Isabella.

After the two agreements were reached in 1962 and 1963, Applications 9446, 9447 and several later applications were cancelled at the request of the applicants. This was done after the Water Rights Board had held a hearing on the applications and entered Decision 1196 in 1964. Decision 1196 denied issuance of a permit because the applicants presented no evidence to show that unappropriated water was available in the Kern River. It appears that, having reached an agreement among themselves on the diversion of Kern River water under alleged pre-1914 rights, the applicant and other Kern River water users may have been primarily interested in a decision from the Water Rights Board establishing that there was no water available for appropriation from the Kern River. Decision 1196 should not be taken as establishing the lack of water available for appropriation, however, because the finding did not state that there was no unappropriated water. Rather, the finding was that there was no showing that there is unappropriated water.

Some of the questions which remain unanswered are:

1. What is the basis of the right to store water in Lake Isabella?
2. If the parties to the two agreements are relying on pre-1914 appropriative rights for direct diversion, may those rights be converted to storage rights?
3. Was a right to storage in Buena Vista Lake initiated prior to December 19, 1914?
4. If the parties intent was to transfer a storage right from Buena Vista Lake to Lake Isabella was there a proportionate reduction in storage in Buena Vista Lake?

After Applications 9446 and 9447 were cancelled the Water Rights Board did not investigate to determine if the diversion of water in Lake Isabella to storage constituted an illegal diversion. Water Code Section 1052, however, provides that unauthorized diversion of water is a trespass subject to an action by the Board for injunctive relief. Therefore, the basis for authority to divert water to storage at Lake Isabella, as well as the basis for authority to divert water at the Kern River Intertie are appropriate subjects for an inquiry by this Board.

Pending Litigation Concerning Kern River Water Rights

A complaint has been filed in the Kern County Superior Court, River West Inc. et al. v. State of California, et al., Case No. 174778. The plaintiffs seek injunctive relief against interference with alleged riparian and appropriative rights and against the alleged violation of an earlier Superior Court judgement. The plaintiffs ask the court to determine their respective water rights and those of numerous other Kern River users. At least three other lawsuits have also been filed in the past few years concerning water rights on the Kern River.²

In the lawsuit brought by River West Inc., the attorney for the plaintiffs River West Inc., et al. has requested the Judicial Council to appoint a judge experienced in water law to handle all aspects of the case. When a judge is assigned to the case on a long-term basis, we anticipate the plaintiffs will petition the court to refer the case to the Board under Water Code Sections 2000 or 2001. We believe that a court reference would narrow the issues and reduce the number of parties from those which would be involved in a statutory adjudication.

Alternate Courses of Action

The existence of several pending water right applications eventually will require the Board to determine if unappropriated water is available for diversion and use. A listing of these applications is attached. (See Attachment 1) In order to make a finding on availability of unappropriated water, a determination of the existing water rights will be necessary. Because of the complexity and uncertainty of water rights in the Kern River watershed, a determination of the existing rights is likely to require some form of adjudication. Such an adjudication could be undertaken either as the result of the civil suit brought by River West Inc. or by the Board's approval of the petition for a statutory adjudication. The complexity of the matter, however, makes it doubtful that a court would undertake such an adjudication on its own. Therefore, the Board likely will be involved in resolution of the major issues regarding Kern River water rights, either through a statutory adjudication or through a court reference.

² 2a. Title Insurance and Trust Co. v. Miller and Lux Inc., Kern County Superior Court No. 7093.

b. Lost Hills Water District, et al v. State of California, et al., Fresno County Superior Court No. 292777-0,

c. Kern Property Corporation, et al., v State of California, et al., Kern County, Superior Court No. 181265

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Depending upon the scope of an order of reference from the court, a court reference proceeding probably would allow the Board to focus its investigation and findings on the major water right issues involved without attempting to define every water right in the watershed. In contrast, a statutory adjudication would result in a much more comprehensive determination of rights. In addition, if a court order of reference is received by the Board, the Board's role would be to investigate and report upon the issues at the direction of the court, whereas a statutory adjudication would require a Board finding that the public interest and necessity would be served by the adjudication. A statutory adjudication would be extremely time consuming, expensive and controversial.

By letter dated August 5, 1983, the attorney for the petitioners was informed that the Board was withholding action on the petition for adjudication pending the Court's action on the request for reference of the lawsuit to the Board to proceed as referee in the matter.

Overall, staff believes that issues regarding water rights on the Kern River could best be addressed in the context of a court reference. Therefore, staff recommends withholding action on the petition for a statutory adjudication until the court determines whether to refer the pending litigation to the Board as referee.

ATTACHMENT 1UNAPPROVED APPLICATIONS

- A26351 - North Kern Water Dist - Poso Creek (Tulare Lake Basin) - 320 cfs +
15,000 afa onstream + 25,000 afa underground - Nov 1 - May 31 -
Irrigation and recreational (SE-SW 26, 26S, 25E, M)
- A26454 - Cawelo Water Dist - Poso Creek (Tulare Lake Basin), 250 cfs
Oct 1 - July 31
Irrigation (NW-SE 29, 27S, 27E, M)
- A26460 - Southern California Edison - Kern River - 800 cfs, Jan 1 - Dec 31
Power (SW-NW 5, 28S, 31E, M)
- A26472 - Anderson - Kern River - 19 cfs, Jan 1 - Dec 31
Irrigation (SW-SW 23, 25S, 21E, M)
- A26473 - Puryear - Kern River - 26 cfs, Jan 1 - Dec 31
Irrigation (NW-NE 22, 25S, 21E, M)
- A26474 - River West Inc - Kern River - 5 cfs Jan 1 - Dec 31
Irrigation (NE-NW 9, 25S, 21E, M)
- A26706 - Bitzer, Cap Cr Trib to South Fork Kern River - 3 afa, Jan 1 - Dec 31
Irrigation & Domestic (NE-SW 6, 26S, 36E, M)
- A26712 - Olcese Water Dist - Kern River - 1000 cfs, Jan 1 - Dec 31
Power (NW-NE 6, 29S, 30E, M)
- A26729 - Kern Ppty Corp - Kern River - 35 cfs, Jan 1 - Dec 31
Irrigation (SW-SE 13, 26S, 21E, M)
- A26730 - Kern Ppty Corp - Kern River - 2 cfs, Jan 1 - Dec 31
Irrigation (NE-NE 1, 26S, 21E, M)
- A26731 - Kern Ppty Corp - Kern River - 2 cfs, Jan 1 - Dec 31
Irrigation (NE-NW 1, 26S, 21E, M)
- A26732 - Kern Ppty Corp - Kern River - 2 cfs, Jan 1 - Dec 31
Irrigation (SW-SE 1, 26S, 21E, M)
- A26733 - Kern Ppty Corp - Goose Lake Canal - 20 cfs, Jan 1 - Dec 31
Irrigation - (SE-SE 20, 26S, 22E, M)
- A26734 - Kern Ppty Corp - Goose Lake Canal - 22 cfs, Jan 1 - Dec 31
Irrigation - (SE-SE 20, 26S, 22E, M)
- A26735 - Kern Ppty Corp - Goose Lake Canal - 27 cfs, Jan 1 - Dec 31
Irrigation - (SW-NE 20, 26S, 22E, M)
- A27597 - Berenda Mesa Water District - Kern River - 57,000 ac-ft/ann
underground storage
Irrigation (Secs 1, 2, 30S, 26E and Secs 6, 13-30, 30S, 27E, M)
- A27554 - Lost Hills Water Dist - Kern River - 100 cfs - Jan 1 - July 31
Irrigation (NW-NE 35, 25S, 21E, M)
- A28510 - Olcese Water Dist. - Kern River - 600 cfs Jan 1 - Dec 31
Power (NW-NE 6, 29S, 30E, M)

FIGURE 1



